

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network (UCAN),

Complainant,

vs.

Pacific Bell Telephone Company,

Defendant.

Case 02-01-007
(Filed January 7, 2002)

Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Pacific Bell Telephone Company (U 1001 C), Pacific Bell Internet Services, and SBC Advanced Solutions, Inc. (U 6346 C) to Determine Whether They Have Violated the Laws, Rules and Regulations Governing the Inclusion of Charges for Products or Services on Telephone Bills.

Investigation 02-01-024
(Filed January 23, 2002)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants \$177,201.55 to Utility Consumers' Action Network (UCAN) for contributions to Decision (D.) 02-10-073.

1. Background

On January 7, 2002, UCAN filed complaint Case (C.) 02-01-007 against Pacific Bell Telephone Company (Pacific Bell) setting forth various allegations

concerning Pacific Bell's billing, customer service, disconnection and marketing practices, and tariff inadequacies, all relating to Pacific Bell's DSL service.

On January 23, 2002, the Commission issued Order Instituting Investigation (I.) 02-01-024 into, among other things, various DSL and Internet service billing and customer service-related practices by Respondents Pacific Bell and its affiliates, Pacific Bell Internet Services (PBI) and SBC Advanced Solutions, Inc. (ASI). The investigation was to afford the Commission's Consumer Protection and Safety Division (CPSD, formerly Consumer Services Division) a forum to advance its evidence of violations of the law and Commission orders, and for Pacific Bell, PBI and ASI to respond. UCAN's complaint and the Commission's investigatory order set forth some allegations that overlapped and some that were unique. Assigned Administrative Law Judge (ALJ) McVicar subsequently consolidated the complaint and investigation.

On March 13, 2002, UCAN filed a timely Notice of Intent (NOI) to claim compensation. ALJ McVicar found UCAN eligible to file for intervenor compensation by ruling dated April 8, 2002.

The week before evidentiary hearings were scheduled to begin, the parties contacted the ALJ to report that they were engaged in negotiations that they believed could successfully resolve all issues. The ALJ agreed to adjourn the first week of hearings on a day-to-day basis to allow them to continue their negotiations, subject to beginning evidentiary hearings immediately if and when any party reported that they were no longer making satisfactory progress. At the last day of evidentiary hearing on July 3rd, the parties answered questions from the ALJ on the latest, nearly-final version of a settlement. They executed the final settlement agreement and filed it with an accompanying motion later that afternoon. D.02-10-073 adopted the settlement without modifications.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§ 1801-1812.¹ Section 1804(a) requires an intervenor to file an NOI to claim compensation within prescribed time periods. The NOI must present information regarding the nature and extent of the customer's planned participation and an itemized estimate of the compensation the customer expects to request.² It may also request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Under § 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" means that,

...in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.

¹ All statutory citations are to the Public Utilities Code.

² To be eligible for compensation, an intervenor must be a "customer," as defined by § 1802(b). In today's decision, "customer" and "intervenor" are used interchangeably.

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

3. Timeliness of Request

Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. D.02-10-073 was issued on October 30, 2002. UCAN's request for compensation was filed on November 19, 2002 and thus is timely.

4. Substantial Contribution to Resolution of Issues

Pursuant to § 1802(h), a party may make a substantial contribution to a decision in several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted. A substantial contribution includes evidence or argument that supports part of the decision even if the Commission does not adopt a party's position in total. Where a party has participated in settlement negotiations and endorses a settlement of some or all issues, the Commission uses its judgment and the discretion conferred by the Legislature to assess requests for intervenor compensation.³

In this instance, both UCAN and CPSD prepared and served extensive written testimony and exhibits analyzing and explaining the events and

³ See D.98-04-059, *mimeo.* at 41.

Respondents' actions that led to this proceeding. CPSD's analyses keyed on complaints to our Consumer Affairs Branch and to Respondents' customer service representatives, while UCAN drew on complaints it had received to explain the breadth and seriousness of Respondents' problems. UCAN's filing notes, "In its opening testimony, UCAN listed a set of recommended remedies that it thought was appropriate. UCAN was the only party to specify remedies. At the end of its testimony, UCAN described a five-fold remedial strategy.... The settlement adopted by the Commission contains remedies that mirror each of those proposed by UCAN." UCAN goes on to detail a number of settlement provisions as examples that mirror remedies it proposed. Those include: creation of the DSL Internet billing center; additional customer service representative training, order review, and audits; improved order entry and validation procedures; written and telephone customer follow-up to confirm orders and billing; improved investigation of unauthorized sales; and \$25 customer credits for billing errors.

UCAN attached to its compensation request a letter from the CPSD counsel acknowledging that UCAN contributed substantially to the resolution of several issues for which UCAN was primarily responsible, that UCAN's work freed CPSD to focus on specific issues from the investigatory order, that UCAN's efforts were complementary and not duplicative of CPSD's efforts, and that evidence presented by both was responsible for the resulting settlement.

The settlement that emerged addressed fully the concerns and issues raised by both UCAN and CPSD. In the end, where there were problems with Respondents' operations and practices that harmed consumers, those problems have been exposed and measures taken to ensure they do not recur. Where there were violations of law, those violations have been acknowledged and an

appropriate penalty applied. UCAN's efforts in bringing the complaint and prosecuting both the complaint and our investigation through to settlement were essential to achieving that end. UCAN made a substantial contribution to the outcome of the case.

In D.98-04-059, the Commission noted that an element a customer's demonstration of "substantial contribution" is a showing that the customer's participation was "productive," as that term is used in § 1801.3, where the Legislature provided guidance on program administration.⁴ D.98-04-059 explained that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the ratepayer benefits of their participation. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

As a result of this proceeding, Respondents acknowledged that 30,000 to 70,000 customers complained about and/or were affected by billing errors, that customers inappropriately had toll restrictions placed on their accounts or received improper disconnect notices, and that Pacific Bell failed to maintain accurate records and submit required reports to the Commission. While UCAN's request for compensation does not assign a dollar value to the outcome, the fact that Respondents agreed to pay a \$27,000,000 penalty and make significant changes to their operating practices demonstrates that the value to ratepayers far exceeds the intervenor compensation costs UCAN is claiming.

⁴ See D.98-04-059, *mimeo.* at 31-33, and Finding of Fact 42.

These facts and CPSD's letter confirm our own observations: UCAN's participation was indeed productive and not duplicative of others' participation. UCAN's participation satisfies all the requisite elements of substantial contribution.

5. Reasonableness of Requested Compensation

UCAN requests \$177,201.55⁵ as summarized in Table 1.

Table 1

Advocate	Year	Hours	Rate	Total
Shames	2002	426.5	\$ 195.00	\$ 83,167.00
Biddle	2002	349.6	\$ 100.00	\$ 34,960.00
Beebe	2002	172.1	\$ 75.00	\$ 12,907.50
Rosner	2002	103.75	\$ 300.00	\$ 31,125.00
Mansfield	2002	28.5	\$ 300.00	\$ 8,550.00
Personnel subtotal				\$170,709.50
UCAN expenses				\$ 5,545.05
Rosner & Mansfield expenses				\$ 947.00
Expenses subtotal				\$ 6,492.05
Total Compensation				\$177,201.55

5.1 Hours Claimed

UCAN notes that the intervenor compensation amount claimed in this proceeding is about one-third higher than the \$132,000 estimate it provided in its NOI. UCAN attributes the increase to three primary factors: discovery disputes; the voluminous testimony needed to support its case; and extensive settlement negotiations coupled with scheduling conflicts. UCAN and Pacific Bell each filed motions to compel discovery, seeking extensive documentation from one another. Under one law-and-motion ruling, UCAN was obligated to expend

⁵ UCAN's claim is for \$177,291.55, but by our calculation, relying on UCAN's supporting documents, the total comes to \$177,201.55 as set forth in the table above. Today's award allows all documented hours and expenses.

considerable effort going through all DSL-related billing complaints it had received to redact each customer's personal identifying information before providing them to Pacific Bell. In preparation for hearing, UCAN presented over 700 pages of opening and 100 pages of rebuttal testimony. UCAN reports that settlement negotiations went on for a one-month period during which UCAN counsel and expert witness Michael Shames had scheduling conflicts with two other Commission cases. As a result, UCAN was obligated to use the services of an outside law firm, Rosner, Law and Mansfield, to substitute for and supplement work Shames would otherwise have done himself. UCAN's billing does show that most of the cost above its NOI estimate could be accounted for by the hours billed by Hallen Rosner for the extensive settlement negotiations. Under the circumstances, we find that UCAN has adequately and reasonably supported the hours for which it claims compensation.

5.2 Hourly Rates

Section 1806 requires the Commission to compensate eligible parties at a rate that reflects the "market rate paid to persons of comparable training and experience who offer similar services." We have on previous occasions adopted the rates requested for Shames (\$195/hour) and Jodi Beebe (\$75/hour), most recently in D.02-11-020 for work in 2000 and 2001. UCAN seeks the same rates for their work in this proceeding during 2002. We grant UCAN's request.

UCAN requests a \$100/hour rate for staff attorney Lee Biddle for work in 2002. Biddle holds a Bachelor of Arts degree in political science with a minor in economics. Before being admitted to the California State Bar in 2001, he worked as a policy director and press secretary for a San Diego city council member, a law clerk for the San Diego District Attorney's Office, a judicial extern for a federal magistrate judge, and a law clerk for the San Diego City Attorney's

Office. Biddle joined UCAN in early-2002. We accept the hourly rate UCAN proposes for Biddle as well within the range of rates awarded to other first-year attorneys with comparable experience.

Consistent with our usual practice, UCAN has separated out hours spent traveling and preparing its intervenor compensation award claim, and charged for them at one-half of its requested hourly rates.

UCAN also relied on the services of Hallen Rosner and Alan Mansfield of the Rosner, Law & Mansfield law firm. Rosner and Mansfield billed UCAN at \$300/hour for their services during 2002, said to be substantially lower than their \$400/hour standard rate. UCAN characterizes Rosner and Mansfield as highly qualified class action attorneys with substantial consumer litigation background, a characterization confirmed by the detailed narrative of their qualifications attached to the request. Each has been in practice for more than 15 years; each has a substantial background in consumer law; and each has successfully handled high-profile cases. After reviewing their qualifications, we agree that \$300/hour for 2002 is in the range of rates we have awarded to others of comparable background. UCAN's requested rate for Rosner and Mansfield is reasonable.

5.3 Other Costs

UCAN has listed \$5,545.05 in expenses associated with this case for its travel, photocopying, and postage, and \$947 in expenses billed by Rosner, Law and Mansfield. The cost breakdown included with UCAN's claim shows its miscellaneous expenses to be commensurate with the work performed. We find UCAN's other costs reasonable.

6. Total Award

We award UCAN \$177,201.55 for contributions to D.02-10-073, as detailed in Table 1 above. Consistent with previous Commission decisions, we will order that UCAN receive that amount plus interest calculated at the three-month commercial paper rate. Interest is to commence on the 75th day after UCAN filed its compensation request and continue until full payment has been made. No party has suggested a method for allocating the award among the three Respondents. Considering that the violations established in this proceeding related entirely to Respondents' provision of DSL and/or Internet services to end-users of those services, it is appropriate that the obligation for paying the award be allocated on the basis of Respondents' revenues from end-users of those same services. Thus, the payment obligation will be allocated among them in proportion to their gross revenues from providing DSL and/or Internet services to end-users in California in the most recent year for which recorded data are available.

As in all intervenor compensation decisions, we put UCAN on notice that it must make and retain adequate accounting and other documentation to support its intervenor compensation claim, and that the Commission staff may audit UCAN's records related to this award. Those records should identify specific issues for which it has requested compensation, the actual time spent, the applicable hourly rate, and any other costs for which compensation is claimed.

7. Waiver of Comment Period

Pursuant to Rule 77.7(f)(6), the otherwise applicable 30-day period for public review and comment is being waived.

8. Assignment of Proceeding

Carl Wood is the Assigned Commissioner and James McVicar is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. UCAN made a timely request for compensation for its contributions to D.02-10-073.
2. UCAN contributed substantially to D.02-10-073.
3. UCAN's participation was productive in that the costs claimed for its participation were less than the benefits realized.
4. UCAN requests hourly rates for Shames and Beebe that have previously been approved by the Commission.
5. The requested hourly rates for Biddle, Rosner and Mansfield are reasonable.
6. The hours claimed for work performed in this case are itemized and reasonable.
7. The miscellaneous costs incurred by UCAN are reasonable.
8. Considering that the violations established in this proceeding related entirely to Respondents' provision of DSL and/or Internet services to end-users of those services, it is appropriate that the obligation for paying the award be allocated on the basis of Respondents' revenues from end-users of those same services.
9. The Appendix to this decision summarizes today's award.

Conclusions of Law

1. UCAN has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation.
2. UCAN should be awarded \$177,201.55 for contributions to D.02-10-073.

3. Per Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

4. This order should be effective today so that UCAN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. Utility Consumers' Action Network (UCAN) is awarded \$177,201.55 in compensation for its substantial contribution to Decision 02-10-073.

2. Pacific Bell Telephone Company, Pacific Bell Internet Services, and SBC Advanced Solutions, Inc. (jointly, Respondents) shall pay UCAN the award granted by Ordering Paragraph 1. The payment obligation shall be allocated among them in proportion to their gross revenues from providing DSL and/or Internet services to end-users in California in the most recent year for which recorded data are available.

3. Respondents shall make payment within 30 days of the effective date of this order. Respondents shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15, beginning the 75th day after November 19, 2002, the date the request was filed, and continuing until full payment has been made.

4. The comment period for this decision is waived.

5. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

Compensation Decision(s):	
Contribution Decision(s):	D0210073
Proceeding(s):	C0201007/I0201024
Author:	ALJ McVicar
Payer(s):	Pacific Bell Telephone Company, Pacific Bell Internet Services, and SBC Advanced Solutions, Inc.

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
Utility Consumers' Action Network	11/19/02	\$177,291.55	\$177,201.55	arithmetic errors

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Michael	Shames	Attorney	Utility Consumers' Action Network	\$195	2002	\$195
Lee	Biddle	Attorney	Utility Consumers' Action Network	\$100	2002	\$100
Jodi	Beebe	Policy Expert	Utility Consumers' Action Network	\$75	2002	\$75
Hallen	Rosner	Attorney	Utility Consumers' Action Network	\$300	2002	\$300
Alan	Mansfield	Attorney	Utility Consumers' Action Network	\$300	2002	\$300